JAMES W. TAYLOR & ASSOCIATES, INC.

IBLA 82-771 Decided November 24, 1982

Appeal from a letter-decision of the Alaska State Office, Bureau of Land Management, stating that Chugach Natives, Inc., had met the requirements of 43 CFR 3410.2-1(d) and that the Bureau of Land Management would take no further action concerning coal exploration licenses AA-42150, AA-42151, and AA-42152.

Set aside and remanded.

1. Alaska: Coal Leases and Permits -- Coal Leases and Permits: Applications

Pursuant to 43 CFR 3410.2-1(d) an applicant for a coal exploration license is required to provide an opportunity for other parties to participate in exploration under the license on a pro rata cost sharing basis. Where a party seeks to participate, it is required to submit information about its exploration plans such that BLM can determine whether such a party has legitimate exploration needs that must be accommodated. Thus, BLM determines whether to allow participation; arrangements concerning participation are then left to the parties.

APPEARANCES: Ray D. Gardner, Esq., Anchorage, Alaska, for James W. Taylor & Associates, Inc.; Bart K. Garber, Esq., Anchorage, Alaska, for Chugach Natives, Inc.

OPINION BY ADMINISTRATIVE JUDGE HARRIS

On April 28, 1982, James W. Taylor & Associates, Inc. (Taylor), appealed a March 31, 1982, letter-decision of the Alaska State Office, Bureau of Land Management (BLM). In that letter-decision, BLM stated:

> This is to further clarify the position of the Department of the Interior regarding the coal program now ongoing in the Bering River Coal Fields near Cordova, Alaska, in which Chugach Natives, Inc., is the licensee, and your company [Taylor] has

> requested participation rights. We requested additional guidance from our Washington Office of Coal Management to assist us in making a determination of whether the offer made to your firm by Chugach Natives, Inc., (letter dated 6-29-81) did, in fact, constitute an offer to participate under the licenses, and if the requirements of 43 CFR 3410.2-1(d) had been met.
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> * * * the participating agreement is, indeed, a private agreement between parties. The requirements of 43 CFR 3410.2-1(d) were met by Chugach Natives, Inc., when they offered your company the opportunity to receive all data and information derived from the program if your company assumed 50% of the total cost of the exploration program, i.e., $500,000.
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> Since the participating agreement is a private contract between parties involved in the coal exploration program, the Bureau can take no further action in the matter at this time.

The parties do not disagree as to the basic facts in the present controversy. Those facts are as follows. On March 17, 1981, Chugach Natives, Inc. (Chugach), filed with BLM three applications (AA-42150, AA-42151, and AA-42152) for coal exploration licenses covering a total area of 69,421.63 acres in the Bering River coal field in south central Alaska. Pursuant to 43 CFR 3410.2-1(d)(1), Chugach published a notice of invitation to participate in the exploration on March 20 and 27, 1981. Taylor filed a timely response accepting Chugach's invitation to participate.

Subsequently, Taylor informed BLM that Chugach had not responded to its acceptance of the invitation. A memorandum in the case file dated June 8, 1981, reported a telephone conversation between BLM and Chugach in which BLM sought to determine what efforts, if any, Chugach had made to accommodate Taylor. Chugach indicated that it "felt the regs only required publication of a 'Notice of Invitation'" and "that there was no reason for anyone else to want to participate." The BLM employee explained to Chugach "that if [it] didn't allow James W. Taylor & Assoc. to participate under the provisions of the licenses, BLM would have to pull the licenses."

By letter dated June 26, 1981, Taylor informed BLM that Chugach had not afforded Taylor any opportunity to participate. By letter dated June 29, 1981, Chugach apprised Taylor as follows:

> As you know, a consortium of Korean companies, in partnership with Chugach, has already begun conducting this exploration and core drilling program. The estimated cost for this first summer's field work is US $1 million. If J. W. Taylor & Associates, Inc. desires to participate in this project also, you will be responsible for 50% of the cost, or approximately US $500,000.
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> As an active partner, Taylor will be entitled to receive all of the data and information derived from the program. Unfortu- nately, we are not at this time able to offer you any type of long-range production deal, as the Korean consortium has already

been afforded a right of first refusal should the coal data prove favorable and Chugach receive a right to acquire this property under the Alaska Native Claims Settlement Act.

On July 7, 1981, BLM directed a letter to Taylor indicating its familiarity with Chugach's proposal and stating that "[w]e assume that [Taylor and Chugach] have now reached an agreement. Since the participating document is a private agreement between those parties involved in the coal exploration program, the Bureau can take no further action in the matter at this time."

Taylor responded to BLM on July 15, 1981, stating that agreement with Chugach had not been reached. On the same date Taylor directed a letter to Chugach attempting to initiate negotiations. Taylor requested that Chugach, prior to negotiating, provide Taylor with information which would enable it to evaluate the exploratory program, including a list of all contractors and subcontractors, written estimates of costs, copies of applicable aircraft insurance coverage, Alaska Worker's Compensation coverage, other liability coverage, and a proposed new timetable for conduct of field work. On August 12, 1981, Chugach responded stating that while it believed the time for participation had passed, it was still willing to offer Taylor the opportunity "to pay one-half the cost incurred in conducting the exploration program and upon payment we will deliver to you the raw data gathered from the exploration program. We do not have the final dollar figures as yet, however, the approximate cost of a one-half share is $500,000."

By letter dated August 20, 1981, to Chugach, Taylor renewed its request for pertinent information and indicated that it was unrealistic to expect Taylor to commit unconditionally to an expenditure of $500,000 without being apprised of the details of the exploration program. The September 22, 1981, response of Chugach was that its exploration plan was a matter of public record. On October 7, 1981, Taylor informed Chugach that Chugach's exploration plan was only part of Taylor's request for information and that it didn't provide sufficient information to enable Taylor to make a rational decision regarding Chugach's demand for $500,000 or to request modifications to Chugach's exploration plan pursuant to 43 CFR 3410.2-1(d)(2). On the same date, Taylor wrote to BLM complaining of Chugach's lack of cooperation.

By letter dated October 27, 1981, Chugach stated that "as far as CNI is concerned you have waived your right to participate." Taylor replied by letter dated October 29, 1981, renewing its request for information and negotiations and denying that it had waived its right to participate in the program.

On November 24, 1981, a meeting was held between representatives of Taylor and BLM to discuss the dispute between Taylor and Chugach. Pursuant to a request made at that meeting, Taylor forwarded a letter to BLM dated November 25, 1981, setting forth the information Taylor felt was necessary "to determine what modifications to the operation plan might be necessary before Taylor would be able to commit $500,000.00 to the project as per Chugach's request of June 29, 1981." Taylor emphasized that it was not seeking any proprietary information.

On January 20, 1982, BLM requested Taylor and Chugach to furnish any information not in its file concerning their attempts to resolve their differences. On February 8, 1982, Taylor responded stating that its efforts to participate in exploration activities had been consistently frustrated by Chugach. On March 15, 1982, Chugach responded stating:

> Your Department's regulations require only that "other parties [be given the opportunity] to participate in exploration under the license on a pro rata cost sharing basis." As far as CNI is concerned it extended this opportunity to Mr. Taylor and he declined. There are no further requirements of CNI under your regulations.

On March 31, 1982, BLM issued the letter-decision of which Taylor has sought review.

Taylor, in its statement of reasons, and as noted by Chugach in its answer at page 7, contends that BLM has failed to regulate the conduct of Chugach under the exploration licenses in a manner which could be regarded as "a realistic approach to the intent behind the coal exploration regulations or to its duties and obligations as a regulatory agency" (Statement of Reasons at 8); that Chugach did not make a "good faith" effort to provide "an opportunity for other parties to participate in exploration under the license on a pro rata cost sharing basis" (Statement of Reasons at 7-9); and that Chugach's selection of the property pursuant to the Alaska Native Claims Settlement Act (ANCSA), as amended, 43 U.S.C. §§ 1601-1628 (1976 and Supp. I 1977), and the Alaska National Interest Lands Conservation Act (ANILCA), 16 U.S.C. §§ 3101-3233 (Supp. IV 1980), is irrelevant to the final disposition of this case (Statement of Reasons at 11-12).

Taylor requests that this Board direct BLM to revoke the coal exploration licenses issued to Chugach and reissue them to Taylor.

Pursuant to section 4(b)(1) of the Federal Coal Leasing Amendments Act of 1976, "[t]he Secretary may, under such regulations as he may prescribe, issue to any person an exploration license." 30 U.S.C. § 201(b)(1) (1976). Section 4(b)(3) of that Act provides:

> The licensee shall furnish to the Secretary copies of all data (including, but not limited to, geological, geophysical, and core drilling analyses) obtained during such exploration. The Secretary shall maintain the confidentiality of all data so obtained until after the areas involved have been leased or until such time as he determines that making the data available to the public would not damage the competitive position of the licensee, whichever comes first.

30 U.S.C. § 201(b)(3) (1976).

Regulations to implement the Act were promulgated. The relevant regulation, 43 CFR 3410.2-1, provides in pertinent part as follows:

(d) Applicants for exploration licenses shall be required to provide an opportunity for other parties to participate in exploration under the license on a pro rata cost sharing basis.

(1) Immediately upon the filing of an application for an exploration license the applicant shall publish a "Notice of Invitation," approved by the authorized officer, once every week for 2 consecutive weeks in at least one newspaper of general circulation in the area where the lands covered by the license application are situated. This notice shall contain an invitation to the public to participate in the exploration under the license. Copies of the Notice of Invitation shall be filed with the authorized officer at the time of publication by the applicant, for posting in the proper Bureau of Land Management Office and for Bureau of Land Management's publication of the Notice of Invitation in the Federal Register.

(2) Any person who seeks to participate in the exploration program contained in the application shall notify the authorized officer and the applicant in writing within 30 days after the publication in the Federal Register. The authorized officer may require modification of the original exploration plan to accommodate the legitimate exploration needs of persons seeking to participate, and to avoid the duplication of exploration activities in the same area, or may notify the person seeking to participate that the person should file a separate application for an exploration license. [1/]

(e) An application to conduct exploration which could have been conducted as a part of exploration under an existing or recent coal exploration license may be rejected. [Emphasis added.]

[1] Thus, the regulations require that applicants shall be required to provide an opportunity for other parties to participate in exploration under the license on a pro rata cost sharing basis. Chugach complied with the publication requirement to 43 CFR 3410.2-1(d)(1), and Taylor made a timely response in accordance with 43 CFR 3410.2-1(d)(2). Unfortunately, the regulations provide little guidance concerning BLM's role in participation arrangements. 43 CFR 3410.2-1(d)(2) states only that the authorized officer may require modification of the original exploration plan to accommodate the legitimate exploration needs of persons desiring to participate or that he may require such a person to file a separate application.

Chugach's position is that by offering to provide data to Taylor for one-half the exploration cost or approximately $500,000, it has satisfied any obligation it may have had under the regulations. On the other hand, Taylor asserts that Chugach did not comply with the regulations because Chugach's offer could not be considered as affording Taylor an opportunity when Chugach

1/ 43 CFR 3410.2-1(d) was renumbered and changed by 47 FR 33135 (July 30, 1982). The charge is not fundamental to the result in this case.

refused to provide any information that would allow Taylor to make an informed business judgment concerning the merits of spending $500,000 to participate.

The preamble to the final Departmental rulemaking relating to 43 CFR 3410.2-1 states:

> Subpart 3410 -- Exploration Licenses
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> * * * * * * *
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> Several comments objected to the provision in § 3410.2-1(d) requiring any applicant for an exploration license to provide an opportunity for others to participate in such exploration. Objections were also raised to the provision allowing the authorized officer to require modification of an exploration plan to accommodate any additional participants. In order to avoid duplication of exploration activities in an area, the provision requiring an applicant to publish an invitation to others to join in the exploration has been retained. However, the rulemaking has been rewritten to limit the authorized officer's authority to modify an original exploration plan only to those instances when modification is needed to accommodate the legitimate exploration needs of persons seeking to participate, and to avoid repetitive exploration on the same lands. The Department's policy expressed here is only rarely to modify the original plans and expressly to discourage any attempt by parties not truly interested in exploration to harass or impede exploration efforts by requesting to participate and filing for unwarranted changes in exploration plans.
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> The respondent to a notice does not have to submit a complete exploration plan when he indicates his desire to participate; the authorized officer will request any additional information about the respondent's exploration plans necessary to determine whether to allow participation. [Emphasis added.]

44 FR 42586, 42587 (July 19, 1979).

The preamble places the burden on BLM to determine whether one seeking to participate should be accommodated. The preamble specifically states that a respondent to a notice does not have to submit a complete exploration plan. However, the preamble requires that the authorized officer request any additional information about the respondent's exploration plans necessary to determine whether to allow participation.

While a respondent is not required to submit a complete exploration plan, clearly the regulations contemplate that such a party submit some information so that BLM may determine whether that party has legitimate exploration needs, and if so, whether modifications of the original plan are necessary or whether that party should file a separate application. This is supported by the preamble language which states that BLM may request additional information about the respondent's exploration plans. Thus, a respondent, having submitted information concerning its exploration plans, might be

required by BLM to file additional documentation concerning its plans. Once the necessary information has been submitted, the preamble language indicates that BLM will determine whether to allow participation. 2/

In this case, Taylor did not submit any information to BLM that would allow BLM to determine whether Taylor had legitimate exploration needs. However, neither did BLM inform Taylor that it should submit anything. BLM took the position in this case that, as stated in its March 31, 1982, letter, "the participating agreement is a private contract between parties involved in the coal exploration program." While this statement is true, BLM failed to address its threshold responsibility of determining whether to allow Taylor to participate. BLM failed to determine whether Taylor had legitimate exploration needs which might require modification of Chugach's exploration plan or might require the filing of a separate application by Taylor.

Thus, Taylor and Chugach were left to arrange a participating agreement, yet Chugach did not know whether Taylor had legitimate exploration needs, and Taylor had no information from Chugach on which to base a sound financial business decision on whether to participate.

In this case, Taylor erred by failing to provide any information relating to its exploration plans. BLM had the responsibility of determining whether to allow participation by Taylor; however, because Taylor filed no information and BLM requested none, BLM took no action. Assuming BLM had determined that Taylor had legitimate exploratory needs, Chugach should have provided Taylor with the necessary economic data such that Taylor could have determined whether to commit $500,000 to the project.

BLM's letter which is the subject of this appeal is premature. BLM made no determination in this case concerning Taylor's participation. As pointed out, supra, under the regulations BLM has a threshold responsibility to decide whether one seeking to participate has legitimate exploratory needs which must be accommodated by modification of the applicant's plan or whether such a party should file its own plan. No such determination

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2/ Our interpretation of BLM's responsibilities comports with recent BLM Manual Release 3-61, dated Oct. 18, 1982. The transmittal sheet for the release states: "This release contains instructions to implement the regulations on surface exploration (at 43 CFR 3410) and Departmental policy on surface exploration of unleased Federal coal deposits." Section 3410.21A of the release relates to actions to be taken by the State Office following receipt of an application. Those actions are set forth in a list numbers 1-8. Numbers 7 and 8 read as follows:

"7. If any companies or corporations indicated an interest in participating in the exploration license in response to the Federal Register notice at 4, verifies that the requirements of 43 CFR 3410.2-1(c)(2) have been met, verifies that participants have filed notice of interest by end of 30 days after Federal Register notice.

"8. In consultation with Minerals Management Service (MMS), either requires modification of the exploration plan to incorporate legitimate needs of persons seeking to participate or requires the participant to file for a separate exploration license." (Emphasis added.)

was made in this case, principally because Taylor submitted no information. However, that failure might have been addressed by BLM concluding that Taylor had no legitimate exploratory needs and denying it participation, or by BLM soliciting information from Taylor concerning its exploratory plans. BLM did neither.

Since BLM failed to address this initial question, we must set aside the letter-decision appealed from as premature and remand this case to BLM for appropriate action.

We note that the record indicates that all of the lands encompassed by the three coal licenses in question have been selected by Chugach and that BLM is preparing to convey those lands to Chugach. Conveyance of the lands may negate the necessity for any further action in this case.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision of the Alaska State Office is set aside and the case remanded for appropriate action.

Bruce R. Harris
Administrative Judge

I concur:

Douglas E. Henriques
Administrative Judge

ADMINISTRATIVE JUDGE IRWIN CONCURRING:

Although I concur, I do so reluctantly. I write separately in order to highlight parts of the record and to set forth a different understanding of the proper roles of BLM and prospective participants in coal exploration endeavors.

BLM's view was that there was no need to ask Taylor for an exploration plan -- that Taylor would agree to Chugach's exploration plan unless it indicated otherwise at the time of filing the notification that it wished to participate -- and that BLM was free to issue the licenses to Chugach because Taylor had indicated no intention of filing a separate plan. This view of the respective responsibilities of BLM and prospective participants does not correspond to the sequence of events outlined in the regulations themselves:

1. An exploration license application, with three copies of an exploration plan, is submitted to the State Office. 43 CFR 3410.2-1(a), (a)(3).

2. Immediately upon filing the application, the applicant shall publish a notice of invitation in the area where the lands covered by the license application are situated that contains an invitation to the public to participate in the exploration under the license. 43 CFR 3410.2-1(d)(1) (1981).

3. Any person who seeks to participate in the exploration program contained in the application shall notify the authorized officer and the applicant in writing within 30 days after the publication in the Federal Register. 43 CFR 3410.2-1(d)(2) (1981).

4. The authorized officer may (a) require modification of the original exploration plan or (b) notify the person seeking to participate that he should file a separate application for an exploration license. 43 CFR 3410.2-1(d)(2) (1981).

Thus, first, persons "notify" BLM that they wish to participate, then BLM must ask such persons for information that will enable it to determine whether to require modification (to accommodate legitimate needs of prospective participants or to avoid duplicative exploration) or to notify one or more persons to submit separate applications, then such persons must provide such information, and then BLM must make its determination. My colleagues read into the regulation that a person who notifies BLM that it wishes to participate must provide "some" information with its notification. They base this on the language in the preamble to the regulations that says such a person "does not have to submit a complete exploration plan when he indicates his desire to participate." That would be a plausible interpretation if the preamble stopped there. However, the preamble sentence continues: "[T]he authorized officer will request any additional information about the respondent's exploration plans necessary to determine whether to allow participation." (Emphasis added.) And the regulation states only that a person who seeks to participate shall "notify" the authorized officer.

The difficulty with the view that Taylor would agree to the licensee's exploration plan unless it indicated otherwise at the time of filing its notification is that Taylor had not been shown Chugach's plan at that time

or, indeed, at least as late as August 20, 1981, more than 4 months later. (Presumably it is to avoid this kind of problem in the future that BLM now requires that an applicant's notice of invitation "shall contain the location of the Minerals Management Service and Bureau of Land Management Offices in which the application shall be available for inspection." 43 CFR 3410.2-1(c)(1), 47 FR 33135 (July 30, 1982)). Another difficulty with that view is that BLM itself undertook to send Taylor and the other participants copies of the proposed licenses along with copies of the decisions of May 29 and June 15, 1981. Those decisions stated BLM assumed that "the participants will arrange with Chugach Natives, Inc., appropriate methods for participation and cost-sharing," and stated that Chugach would be "allowed a period of 30 days in which to meet the above requirements, failing in which, the license will not be issued." From the participants' perspective it was reasonable to regard those proposed licenses as the exploration program they could participate in and to expect that Chugach was required to work out -- or at least initiate -- the arrangements of that participation within 30 days. Taylor's June 26, 1981, letter to BLM indicates that it so understood those BLM decisions. On July 7, 1981, BLM indicated that the "30 days in which to meet the above requirements" did not apply to participation and cost-sharing, even though they were included "above" that statement. In that letter BLM also stated its position for the first time that "since the participating document is a private agreement between the parties involved in the coal exploration program, the Bureau can take no further action in the matter at this time." This was less than a month after BLM had told Chugach, in response to its assertion that it didn't see any reason for anyone else to want to participate, and that its licenses would be "pulled" if it didn't allow Taylor to participate.

My colleagues conclude that, since BLM failed to determine whether Chugach should modify its exploration plan or whether Taylor should submit a separate application, its March 31, 1982, letter was "premature" and therefore would be set aside and the case remanded to BLM "for appropriate action." They conclude with the observation that BLM's conveyance of the land "may negate the necessity for any further action in this case." They assume such a conveyance is inevitable based on an August 9, 1982, letter from the Chief of the Branch of Lands to the Board requesting the Board to give "greater-than-usual" priority to this appeal so BLM can convey the lands in December 1982.

The record before us does not indicate such a conveyance is inevitable. We have nothing except BLM's August 9 letter to support a claim that Chugach Natives, Inc., is entitled to these lands under section 1429 of the Alaska National Interest Lands Conservation Act, 94 Stat. 2530. Unless and until they are so entitled it seems to me the normal steps under the Mineral Leasing Act of 1920 of collecting data from exploration of these lands and of evaluating whether to offer them for coal leasing should proceed, as the Department indicated they would in Public Land Order No. 5953, 46 FR 30817, 30818 (June 11, 1981).

I recognize, however, that BLM probably never intended to consider leasing, initiated exploration procedures only to enable Chugach to discover coal-rich lands to select, and was therefore indifferent to whether anyone

else participated in the exploration or not. 1/ If this was its plan it should have requested separate applications from Taylor and other prospective participants and then denied them in accordance with the regulations (43 CFR 3410.2-1(d)(2) and (e) (1981)) instead of leaving Taylor in limbo.

I cannot agree with Taylor that the appropriate remedy in this case is to take the licenses from Chugach and award them to Taylor. Such a procedure would be as mistaken as the one BLM followed in the first place, and for the same reason, namely, it would have no information upon which to base a determination whether the original exploration plan should be modified or Taylor told to submit its own separate application. I know of no other remedy that would be realistic at this stage, however. So I concur in a result that leaves Taylor only with the hope that in the future it will find a more cooperative partner and that BLM will follow procedures that inform prospective participants clearly and promptly of their obligations and rights. 2/

1/ See Memorandum dated Apr. 7, 1981, from the State Director to the District Manager concerning Request for Expedited Environmental Analysis -- Coal Exploration Licenses, which reads in part:

"As the applicant plans to begin exploration activities on May 15, 1981, we ask you to give this request for environmental analysis an urgent priority. Under Sec. 1430 of the Alaska National Interest Lands Conservation Act (ANILCA), Chugach Natives, Inc., must finalize their land selection pattern in order to complete Sec. 12(c) selections under the Alaska Native Claims Settlement Act (ANCSA). These three coal exploration license applications have been filed for lands within the Bering River Coal Fields, which are located within the ANCSA 12(c) selection area for Chugach Natives, Inc. In order for Chugach to establish a better selection pattern for these coal lands, it is imperative that the environmental assessment be done immediately and the licenses be either issued or rejected by May 15, 1981."

See also Decision Record for Finding of No Significant Impact and Decision on Proposed Action, Rationale:

"This action will allow the Chugach Natives, Inc., to obtain more data on the coal bearing strata within the Bering River coalfield. This information will assist Chugach Natives, Inc., in making their final land selection pattern since these lands are located within ANCSA 12(c) selection area for Chugach Natives, Inc. Chugach's proposal will serve the public interest in terms of developing Alaska's coal resources."

2/ Of course, this is different from expecting BLM to become involved in the arrangements between the applicant for the license and any prospective participants. BLM has made clear that it will not assume such a role:

"A few comments raised questions about the provisions of § 3410.2-1(c) of the proposed rulemaking which require applicants for exploration licenses to allow all interested parties to participate in the exploration program. One comment went so far as to suggest that the regulations should describe in some detail the rights and obligations of participants. The relative rights and obligations of participants is an area that is best left to negotiation by those participants because they are the best judges of their respective needs and limitations."

47 FR 33116 (July 30, 1982).

This seems to me perfectly appropriate. Cf. Sohio Alaska Petroleum Co., 68 IBLA 250 (1982).

In my view BLM should revise Manual Release 3-61 to set forth what information, if any, a state office should request after a prospective participant has sent in its notification, and when it should request it. If any information is to be required with the notification, 43 CFR 3410.2-1(c)(2) should be amended to specify what it is.

Will A. Irwin
Administrative Judge

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